

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

RAMON CHAVEZ,
Defendant.

No. CR-05-134-FVS

ORDER DENYING MOTIONS TO
DISMISS

THE DEFENDANT came before the Court on November 17, 2005, for a pretrial conference. He was represented by Mr. George P. Trejo, Jr.; the government by Assistant United States Attorney Jared C. Kimball. This order serves to memorialize the Court's oral rulings regarding the defendant's separate motions to dismiss.

BACKGROUND

The defendant was originally charged in state court. The prosecutor offered the defendant a plea agreement. Negotiations ensued. The prosecutor allegedly advised the defendant that he had discussed the defendant's case with an Assistant United States Attorney and that if the defendant refused to plead guilty in state court, the prosecutor would refer the matter to federal authorities and a federal charge would be filed. The defendant refused the state prosecutor's offer. During July of 2004, the prosecutor obtained

1 dismissal of the state charge and asked federal authorities to review
2 the matter. Approximately one year after the state charge was
3 dismissed, a federal grand jury returned an indictment charging the
4 defendant with the crime of being a felon in possession of a firearm.
5 18 U.S.C. 922(g)(1). The defendant moves to dismiss. To begin with,
6 he argues the government is acting vindictively. In addition, he
7 argues the government has violated his right to timely indictment.

8 **VINDICTIVE PROSECUTION**

9 The government deprives a person of due process in violation of
10 the Fifth Amendment by charging him with a crime in retaliation for
11 exercising a statutory, procedural or constitutional right. See
12 *United States v. Robison*, 644 F.2d 1270, 1272-73 (9th Cir.1982)
13 (citing, among other authorities, *Blackledge v. Perry*, 417 U.S. 21, 94
14 S.Ct. 2098, 40 L.Ed.2d 628 (1974)). The defendant alleges the
15 government is retaliating against him for refusing to plead guilty in
16 state court. In order to establish a prima facie case of
17 prosecutorial vindictiveness, "a defendant must show either direct
18 evidence of actual vindictiveness or facts that warrant an appearance
19 of such." *United States v. Sinigaglio*, 942 F.2d 581, 584 (9th
20 Cir.1991) (citing *United States v. Gallegos-Curiel*, 681 F.2d 1164,
21 1168 (9th Cir.1982)). The defendant's vindictive prosecution claim
22 faces three obstacles. To begin with, a prosecutor may threaten more
23 severe charges as part of an effort to persuade the defendant to give
24 up his right to plead not guilty. *Bordenkircher v. Hayes*, 434 U.S.
25 357, 364-65, 98 S.Ct. 663, 668-69, 54 L.Ed.2d 604 (1978). Moreover,
26

1 state officials may refer a case to their federal counterparts in
2 order to obtain more severe penalties. *United States v. Nance*, 962
3 F.2d 860, 864-65 (9th Cir.1992) (*per curiam*). Finally, the Ninth
4 Circuit has questioned whether a prosecution may be considered
5 vindictive "when the defendant's claim is that one sovereign is
6 punishing him for rights he asserted against a different sovereign."
7 *Robison*, 644 F.2d at 1273. Indeed, the circuit court has observed,
8 "The role of a separate sovereign in bringing increased charges
9 minimizes the likelihood of prosecutorial abuse." *United States v.*
10 *Ballester*, 763 F.2d 368, 370 (9th Cir.), *cert. denied*, 474 U.S. 842,
11 106 S.Ct. 126, 88 L.Ed.2d 103 (1985). Viewing the facts of this case
12 in light of the preceding principles, there is no reason to allow the
13 defendant to conduct discovery in support of his vindictive
14 prosecution claim or to require the government to justify its decision
15 to seek the instant charge. See *United States v. One 1985 Mercedes*,
16 917 F.2d 415, 421 (9th Cir.1990) ("a criminal defendant may be
17 entitled to discovery if he or she establishes a prima facie showing
18 of a likelihood of vindictiveness by some evidence tending to show the
19 essential elements of the defense"). Instead, the defendant's motion
20 to dismiss on grounds of vindictive prosecution will be denied.
21

22 **PRE-INDICTMENT DELAY**

23 The defendant moves to dismiss on the ground that the
24 government's delay in seeking his indictment violated the
25 Constitution. Pre-indictment delay is measured under the Due Process
26 Clause of the Fifth Amendment. *United States v. Romero*, 585 F.2d 391,

1 398 (9th Cir.1978), *cert. denied*, 440 U.S. 935, 99 S.Ct. 1278, 59
2 L.Ed.2d 492 (1979). The defendant must establish two things in order
3 to demonstrate that the government deprived him of due process by pre-
4 indictment delay: "1) he must prove that he suffered actual,
5 non-speculative prejudice from the delay; and 2) he must show that the
6 delay, when balanced against the government's reasons for it offends
7 those fundamental conceptions of justice which lie at the base of our
8 civil and political institutions." *United States v. DeGeorge*, 380
9 F.3d 1203 (9th Cir.2004) (internal punctuation and citations omitted).
10 To date, the defendant has submitted no evidence of prejudice. Absent
11 evidence of actual, non-speculative prejudice, the government is under
12 no obligation to justify the pre-indictment delay. Instead, the
13 defendant's motion to dismiss on this ground will be denied.

14 **IT IS HEREBY ORDERED:**

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16 1. The defendant's "Motion to Dismiss Based on Vindictive
17 Prosecution" (**Ct. Rec. 61**) is denied.

18 2. The defendant's "Motion to Dismiss Based on a Violation of
19 Right to a Speedy Trial" (**Ct. Rec. 63**) is denied.

20 **IT IS SO ORDERED.** The District Court Executive is hereby
21 directed to enter this order and furnish copies to counsel.

22 **DATED** this 21st day of November, 2005.

23
24 s/Fred Van Sickle
Fred Van Sickle
25 United States District Judge
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